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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-5729

MARK DAVID OLIPHANT and DANIEL B. BELGARDE,

Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, *et al.*,

Respondents.

BRIEF *AMICI CURIAE* OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., THE SENECA NATION OF INDIANS OF NEW YORK THE OGLALA SIOUX TRIBE OF THE PINE RIDGE RESERVATION, SOUTH DAKOTA, THE HUALAPAI TRIBE OF ARIZONA, THE PUEBLO OF LAGUNA, NEW MEXICO, AND THE CHEYENNE RIVER SIOUX TRIBE OF THE CHEYENNE RIVER RESERVATION, SOUTH DAKOTA IN SUPPORT OF RESPONDENTS

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Am. Indian Policy Review Comm'n *Task Force Four: Federal, State, and Tribal Jurisdiction, Final Report* (1976) 36, 38, 39

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Administrative Materials:

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Indian Self-Determination and the Role of Tribal Courts (American Indian Lawyer Training Program, Inc., 1977) 4, 39
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Pursuant to Rule 42(2), the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 432 Park Avenue South, New York, New York 10016, the Seneca Nation of Indians of New York, the Oglala Sioux Tribe of the Pine Ridge

Reservation, South Dakota, the Hualapai Tribe of Arizona, the Pueblo of Laguna, New Mexico, and the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota, file the attached brief *amici curiae* in support of respondents in the above-captioned case. The petitioners, Mark David Oliphant and Daniel B. Belgarde, and the respondents, the Suquamish Indian Tribe, et al. have consented to the filing of this brief *amici curiae*.

INTEREST OF *AMICI CURIAE*

The Association on American Indian Affairs, Inc., is a nonprofit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nation-wide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and the filing of briefs *amicus curiae* in *Rosebud Sioux Tribe v. Kneip*, ___ U.S. ___, 51 L.Ed.2d 660 (1977), *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), *Puyallup Tribe v. Dept of Game*, 391 U.S. 392 (1968), and *Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685 (1965).

The Seneca Nation, the Oglala Sioux Tribe, the Hualapai Tribe, the Pueblo of Laguna, and the Cheyenne River Sioux Tribe are federally recognized

Indian tribes which, respectively, exercise extensive powers of self-government on the Allegany and Cattaraugus Reservations, the Pine Ridge Reservation, the Hualapai Reservation, the Laguna Reservation, and the Cheyenne River Reservation. Specifically, the aforementioned Indian tribes have established law enforcement systems, and have adopted tribal laws and regulations governing conduct occurring within their reservation boundaries.[1]

This case presents a question of great and continuing concern to the Association, the Seneca Nation, the Oglala Sioux Tribe, the Hualapai Tribe, the Pueblo of Laguna, and the Cheyenne River Sioux Tribe—whether Indian tribes possess inherent jurisdiction, absent express federal treaty or statutory provisions to the contrary, over crimes committed by non-Indians on Indian reservations. In the present case *amici curiae* are concerned with this broad issue in a specific context—namely, whether, in light of the fact its authority to do so has not been limited by a federal treaty or statute, the Suquamish Indian Tribe has the power to exercise jurisdiction with respect to offenses committed by non-Indians within the boundaries of the Port Madison Indian Reservation in the State of Washington.

If the Court of Appeals' decision in this case is not upheld, the Seneca Nation, the Oglala Sioux Tribe, the Hualapai Tribe, the Pueblo of Laguna, and the Cheyenne River Sioux Tribe, as well as numerous other Indian tribes

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[1] Although at the present time the Seneca Nation's tribal courts do not exercise criminal jurisdiction, the Nation frequently is faced with law enforcement problems relating to non-Indians – e.g., attempts to hunt and fish illegally on reservation lands, or to dump trash and refuse on the Seneca property. The Nation's ability to control such conduct obviously would be greatly enhanced if its authority over the criminal activities of non-Indians on the Seneca reservations were clarified and confirmed.

in a similar situation,[2] will not be able to administer effectively systems of criminal justice on their reservations. Even when they possess the authority to do so, state and federal governments historically have demonstrated disturbingly little inclination or capacity for maintaining law and order on Indian reservations with respect to non-Indian offenders. Increasing numbers of tribal courts, therefore, have attempted to fill the law enforcement vacuum created by state and federal disinterest through a strengthening of tribal judicial institutions and the extension of tribal criminal jurisdiction to encompass offenses committed by non-Indians on reservation lands. If Indian tribes are denied the authority to exercise such jurisdiction, their ability to administer effective systems of criminal justice will be diminished substantially. At worst—and it is by no means a fanciful proposition—Indian reservations may become a virtual haven for non-Indian elements who are only too willing to capitalize on the historical unwillingness of state and federal authorities diligently to enforce criminal laws on Indian lands.

In order to facilitate the Court's consideration of the extremely broad legal and policy implications of this case, the Association, the Seneca Nation, the Oglala Sioux Tribe, the Hualapai Tribe, the Pueblo of Laguna, and the Cheyenne River Sioux Tribe have chosen to address issues which are not likely to be covered—or to be approached in identical fashion—in briefs submitted by respondents. Specifically, the attached brief is offered to assist the Court in recognizing that: (1) the

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[2] At the present time well over 100 Indian tribes administer criminal justice systems through tribal courts. *See generally Indian Self-Determination and the Role of Tribal Courts* (American Indian Lawyer Training Program, Inc., 1977).

Suquamish Indian Tribe possesses the power to exercise criminal jurisdiction over offenses committed by non-Indians on the Port Madison Reservation because its authority to do so has not been limited expressly by a federal treaty or statute; (2) as a matter of sound policy, the jurisdiction of Indian tribes over crimes committed by non-Indians is essential to the administration of criminal justice on Indian reservations.

STATEMENT OF THE CASE

Pursuant to the Treaty of Point Elliott, which was entered into on January 22, 1855, certain lands in what is now the State of Washington were set aside for the benefit of the Suquamish Indian Tribe and other enumerated bands of Indians. Specifically, Article II of the Treaty provided the following:

> [The described] tracts [of land] shall be set apart, and so far as necessary surveyed and marked out for [the tribes'] exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent. . . .

Treaty of January 22, 1855, 12 Stat. 927, 928.

At the present time the Suquamish Indian Tribe is a federally recognized Indian tribe which has organized under the Indian Reorganization Act of 1934, 25 U.S.C. §476. In 1965 the Tribe adopted a Constitution and By-laws which were approved by the Secretary of the Interior. Furthermore, in 1973 the Tribe enacted a Judicial Code which created a trial court and court of appeals, and provided that the tribal courts shall have original jurisdiction over all but "major crimes" committed by Indians or non-Indians occurring anywhere within the boundaries of the Port Madison Reservation.

The Suquamish Indian Tribe, which acts as the local government on the Port Madison Reservation and qualifies as a unit of local government under both the Revenue Sharing Act of 1973[3] and the Omnibus Crime Control and Safe Streets Act of 1968[4], has received substantial federal funds for the improvement of law enforcement on the Reservation. The tribal judges frequently participate in the numerous seminars and training sessions which have been established on a broad scale by the Bureau of Indian Affairs and the National American Indian Court Judges Association for the express purpose of upgrading tribal judiciaries. Furthermore, the Suquamish Tribe's law enforcement officers have attended Indian police academies and have received additional in-service training.

The relevant facts relating to petitioners Mark Oliphant and Daniel Belgarde can be summarized in the following manner. On August 19, 1973, petitioner Oliphant, a non-Indian residing on the Port Madison Indian Reservation, became involved in an altercation on the Suquamish Tribal Encampment Grounds, which are held in trust by the United States for the benefit of the Suquamish Indian Tribe. A Suquamish tribal policeman called to the scene was assaulted by petitioner, who, as the result of his conduct, was placed under arrest for assaulting a police officer and resisting arrest. The foregoing events occurred during the annual Suquamish Tribal Celebration known as Chief Seattle Days.

The petitioner was arraigned before the tribal court, and bail was set at $200. He did not post bail, and was incarcerated briefly in a local city jail until he

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[3] See 31 U.S.C. §§ 1221 *et seq.* (1973 Supp.).

[4] See 18 U.S.C. §§ 921 *et seq.* (1970).

subsequently was released on his own recognizance pursuant to an order of the tribal court. In August and September of 1973, a petition and supplement to petition for a writ of habeas corpus were filed in the United States District Court for the Western District of Washington. The petitions challenged the authority of the Suquamish Indian Tribe to exercise jurisdiction over Oliphant.

On October 12, 1974, petitioner Belgarde, a non-Indian, was arrested by Suquamish tribal policemen on a state highway located within the boundaries of the Port Madison Reservation for committing the offenses of injury to public property and reckless endangerment. In December 1974, Belgarde filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Washington which also challenged the authority of the Suquamish Indian Tribe to exercise criminal jurisdiction over non-Indians.

The District Court upheld the exercise of criminal jurisdiction by the Suquamish Tribe in both cases and denied the petitions for a writ of habeas corpus. The United States Court of Appeals for the Ninth Circuit upheld the decision of the District Court in *Oliphant v. Suquamish Indian Tribe* based upon a finding that no federal treaty or law prohibited the Suquamish Indians from exercising jurisdiction over non-Indians committing crimes within the boundaries of the Port Madison Reservation.

SUMMARY OF ARGUMENT

Except as expressly limited by a federal treaty or statute, an Indian tribe possesses jurisdiction over all crimes committed within the boundaries of its reservation. In light of the fact that no federal treaty or

statute restricts the Suquamish Indian Tribe's criminal authority, the Tribe has the power to exercise criminal jurisdiction over offenses committed by non-Indians on the Port Madison Reservation. Moreover, as a matter of sound policy, the jurisdiction of Indian tribes over crimes committed by non-Indians is essential to the administration of criminal justice on Indian reservations.

ARGUMENT

I.

EXCEPT AS EXPRESSLY LIMITED BY A FEDERAL TREATY OR STATUTE, AN INDIAN TRIBE POSSESSES JURISDICTION OVER ALL CRIMES COMMITTED WITHIN THE BOUNDARIES OF ITS RESERVATION.

Absent federal treaty or statutory provisions to the contrary, an Indian tribe has the inherent power to exercise criminal jurisdiction over any crimes committed on reservation lands. Moreover, tribal jurisdiction is territorial rather than personal in nature and extends to non-Indians.

A. In the absence of a federal treaty or statute to the contrary, an Indian tribe has the inherent authority to establish a criminal justice system for the maintenance of law and order on its reservation.

The fundamental principles of tribal self-government were stated in their most classic form by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). There the State of Georgia had attempted to assert jurisdiction over lands belonging to the Cherokee Nation by imprisoning a non-Indian who was living among the Cherokees with their consent. In declaring the state's action to be unconstitutional Chief Justice

Marshall offered the following analysis of the derivation of an Indian tribe's powers of self-government:

> The Indian nations had always been considered as distinct, independent political communities. . . .
>
> * * * * *
>
> [A]nd the settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. 'Tributary and feudatory states', says Vattel, 'do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority, are left in the administration of the state.' At the present day, more than one state may be considered as holding its right of self-government under the guaranty and protection of one or more allies.
>
> The Cherokee Nation, then, is a distinct political community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties and with acts of Congress. The whole intercourse between the United States and this Nation, is, by our constitution and laws, vested in the Government of the United States. The act of the State of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity . . . .[5]

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[5]The petitioners and *amici curiae* supporting them attempt to utilize the Supreme Court's decision in Kake v. Egan, 369 U.S.

[footnote continued]

Id. at 559, 560-61. *Accord, Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831).[6]

The principle of exclusive tribal powers of internal self-government established by the *Worcester* decision has not remained totally unaltered through the passage of time and changing conditions in Indian affairs. According to the leading commentator on Indian law, however, Chief Justice Marshall's opinion still must serve as the analytical point for commencement for any discussion of tribal sovereignty:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest

60 (1962), to stand the *Worcester* case on its head—namely, by arguing that the *Kake* decision established the principle that states have the authority to impose their laws on Indian reservations absent Congressional legislation to the contrary. In the first instance, the *Kake* case involved the state regulation of off- rather than on-reservation activities, and is, for that reason, not relevant here. Moreover, to the extent Kake v. Egan stands for the principle attributed to it by petitioners, the decision has been limited severely—if not implicitly discredited—by the Supreme Court's subsequent decisions in Warren Trading Post v. Tax Comm'n, 380 U.S. 686 (1965), and McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973).

[6] The *amicus curiae* Kitsap County makes extensive use of the separate opinions filed by Justice Baldwin and Justice Johnson in the *Cherokee Nation* case to support the proposition that Indian tribes should not be considered "foreign nations". See Brief for *Amicus Curiae* Kitsap County, at 27. The argument propounded by petitioner is deficient in two respects. First, the Johnson and Baldwin views were not the opinion of the Court, and they have, therefore, little value as legal precedent. Second, as Chief Justice Marshall indicated explicitly in the *Worcester* case, the authority of Indian tribes to exercise powers of self-government was never dependent upon their classification as "foreign nations".

> renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

F. COHEN,[7] HANDBOOK OF FEDERAL INDIAN LAW 123 (1942). *Accord, Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958); *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956).

Courts repeatedly have confirmed the authority of Indian tribes to regulate, as a direct attribute of their powers of self-government, a wide range of activities and conduct occurring on Indian lands. In *Buster v. Wright*, 135 Fed. 947 (8th Cir. 1905), for example, the Eighth Circuit upheld the Creek Nation's imposition of a tax on non-Indians residing within its borders:

> The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it.

[7] In deciding Indian cases, Felix S. Cohen frequently has been relied upon by this Court, and, indeed, in Squire v. Capoeman, 351 U.S. 1, 9 (1956), was referred to as "an acknowledged expert in Indian law. . . ."

Id. at 950. *See Morris v. Hitchcock*, 194 U.S. 384 (1904); *Quechan Tribe v. Rowe*, 531 F.2d 408 (9th Cir. 1976).

Furthermore, the legal principles described above have been applied on numerous occasions in the specific context of tribal criminal jurisdiction. Specifically, the rules have been summarized in the following fashion:

> So long as the complete and independent sovereignty of an Indian tribe was recognized, its criminal jurisdiction, no less than its civil jurisdiction, was that of any sovereign power. . . Such jurisdiction continues to this day, save as it has been expressly limited by the acts of a superior government.

F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 146 (1942). *Accord*, 55 I.D. 14, 57 (1934); *see generally Raymond v. Raymond*, 83 Fed. 721 (8th Cir. 1897); *Standley v. Roberts*, 59 Fed. 836 (8th Cir. 1894).

B. The criminal jurisdiction exercised by Indian tribes is territorial rather than personal in nature and extends to non-Indians.

Legal authorities also have affirmed the proposition that the power over crimes which Indian tribes possess is territorial rather than personal in scope and extends to non-Indians. From an historical perspective, the involvement of a non-Indian in a crime committed on reservation lands by no means has effected a loss of tribal jurisdiction. Indeed, numerous courts have confirmed the jurisdiction of tribes over offenses by tribal members against non-Indians. *See* Vollman, *Criminal Jurisdiction in Indian Country*, 22 U. KAN. L.

REV. 387, 391 (1974); M. WEST, MANUAL OF INDIAN CRIMINAL JURISDICTION § D-2, at 63 (1977).

More important, legal authorities also have held that the criminal jurisdiction of Indian tribes extends to non-Indians committing offenses within the boundaries of Indian reservations. Specifically, the applicable rule has been summarized by the Solicitor of the Department of the Interior as the following: an Indian tribe may "punish aliens within its jurisdiction according to its own laws and customs". 55 I.D. 14, 57 (1934). *Accord*, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 146 (1942).[8]

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[8]The Office of the Solicitor subsequently did rely on the 1934 opinion in holding that the inherent authority of Indian tribes was limited to tribal members, and that any powers exercised with respect to non-Indians had to be delegated by the Secretary of the Interior. *See* Memo. Sol., Nov. 17, 1936; Memo. Sol., Feb. 17, 1939. The later opinions, which apparently construed citations in the 1934 document supporting tribal jurisdiction over members as suggesting impliedly a limitation on tribal powers, basically adopted the position that the criminal jurisdiction exercised by Indian tribes was personal rather than territorial.

The basis for the "personal" view of tribal jurisdiction espoused in the later Solicitor's opinions was unclear. The assumption may have been made that jurisdiction extended originally only to tribal members, but most authority clearly is to the contrary. *See* Indian Cong. Doc. No. 124, 20th Cong., 2nd Sess. (1828-29); H.R. Rep. No. 474, 23rd Cong., 1st Session. 13 (1834).

Alternatively, the proposition that tribal jurisdiction was "personal" in nature may have developed from a perception of tribal courts as "mere educational and disciplinary instrumentalities" created by the Secretary of the Interior for the purpose of elevating and improving the conditions of Indian tribes—a description employed to describe Courts of Indian Offenses in United States v. Clapox, 35 Fed. 575 (D. Ore. 1888). Courts of Indian Offenses, however, have been aptly described as

[footnote continued]

Furthermore, in strong *dicta* the Supreme Court recently has lent considerable support to the proposition that Indian tribes exercise civil and criminal jurisdiction which is distinctly territorial in nature and encompasses the activities of non-Indians. In *Williams v. Lee*, 358 U.S. 217 (1958), which involved a suit by a non-Indian against an Indian in state court to recover a debt, the Court, in developing its analysis, made the following statement concerning the extent of tribal criminal jurisdiction: "... if the crime was by or against an Indian, *tribal jurisdiction* or that expressly conferred on other courts by Congress has remained exclusive." (Emphasis added.) *Id.* at 220. Justice Black emphasized explicitly that the presence of a non-Indian as a party to the proceedings in the *Williams* case was of no legal relevance:

> It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.... The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Id. at 223.

A similar theme emerges from the Supreme Court's recent decision in *United States v. Mazurie*, 419 U.S. 544 (1975). There, in upholding the jurisdiction of an Indian tribe over non-Indians with respect to the regulation of the sale of liquor within reservation

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"arms of the federal government", and were established as administrative federal courts subject to a number of statutory restrictions not applicable to tribal courts in general. Colliflower v. Garland, 342 F.2d 369, 379 (9th Cir. 1965). Limitations imposed on Courts of Indian Offenses, therefore, should not be allowed to determine the ultimate scope of tribal criminal jurisdiction. *See generaliy* M. West, *Manual of Indian Criminal Jurisdiction* §E-10, at 80 (1977).

boundaries, the following summary of tribal authority was offered:

> ... [I]t is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members *and their territory*, Worcester v. Georgia, 6 Pet 515, 557, 8 L Ed 483 (1832); they are 'a separate people' possessing 'the power of regulating their internal and social relations...,' United States v. Kagama, 118 US 375, 381-382, 30 L Ed 228, 6 S Ct 1109 (1886); McClanahan v. Arizona State Tax Comm'n, 411 US 164, 173, 36 L Ed 2d 129, 93 S Ct 1257 (1973). [Emphasis added.]

Id. at 557. Moreover, the *Mazurie* opinion, citing the *Williams* case, again explicitly affirmed the "... authority of tribal courts ... over non-Indians, insofar as ... their transactions on a reservation [are concerned.]" *Id.* at 558.

In light of the aforementioned discussion, a number of conclusions can be drawn concerning the jurisdiction of Indian tribes over offenses committed on their reservations. First, except as expressly limited by a federal treaty or statute, Indian tribes possess the inherent authority to establish a system for administering criminal justice, and to develop specific laws and regulations governing its operation. Furthermore, the criminal jurisdiction so exercised by Indian tribes is fundamentally territorial in nature and extends to non-Indians who commit offenses within reservation boundaries. Thus, the specific question in this case becomes whether a federal treaty or statute exists which expressly limits the Suquamish Indian Tribe's power to exercise jurisdiction over crimes committed by non-Indians within the external boundaries of the Port Madison Reservation.

II.

NO FEDERAL TREATY OR STATUTE HAS LIMITED THE AUTHORITY OF THE SUQUAMISH INDIAN TRIBE OVER OFFENSES COMMITTED BY NON-INDIANS ON THE PORT MADISON RESERVATION, AND THE TRIBE, THEREFORE, POSSESSES THE POWER TO EXERCISE JURISDICTION WITH RESPECT TO CRIMES COMMITTED BY NON-INDIANS WITHIN RESERVATION BOUNDARIES.[9]

The question whether a federal treaty or statute has limited the criminal jurisdiction of the Suquamish Indian Tribe over non-Indians must be decided on the basis of a number of established rules of treaty and statutory construction. First, based upon settled principles of law, doubtful expressions in treaties and statutes relating to Indian tribes are to be resolved in favor of Indian interests. *See Bryan v. Itasca County*, 426 U.S. 373 (1976); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976); *Squire v. Capoeman*, 351 U.S. 1 (1956); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918); *Jones v. Meehan*, 175 U.S. 1 (1899). Second, federal statutes which do appear to limit the powers of self-government exercised by Indian

[9] Although the events leading to petitioner Belgarde's arrest occurred on a state highway traversing the Port Madison Reservation rather than on trust property—as in petitioner Oliphant's case—the distinction does not alter the conclusion that the Suquamish Indian Tribe possessed jurisdiction over Belgarde. Provisions in federal law and decisions of the Supreme Court have made clear the proposition that, for purposes of federal jurisdiction, a state right of way located within the exterior boundaries of an Indian reservation is to be considered Indian country. See 18 U.S.C. §1151 (1970); *see generally* Seymour v. Superintendent, 368 U.S. 351 (1961).

[footnote continued]

tribes are not to be extended by doubtful inference. *See In re Mayfield*, 141 U.S. 107 (1891); *cf. United States v. Quiver*, 241 U.S. 602 (1916). Finally, as a matter of established legal authority, a restriction on ordinary governmental powers must appear by express provision or necessary implication, and, moreover, a presumption of the competency of a local jurisdiction is to be indulged. *See Morris v. Hitchcock*, 21 App. D.C. Cir. 1903), *aff'd*, 194 U.S. 384 (1904); 7 OP. ATT'Y GEN. 174, 180 (1855).

A. The treaties entered into between the Suquamish Indian Tribe and the United States contain no provisions limiting the jurisdiction of the Tribe over crimes committed by non-Indians within the boundaries of the Port Madison Reservation.

The Treaty of Point Elliott, which was the first agreement entered into between the Suquamish Indian Tribe and the United States, does not expressly limit tribal jurisdiction over offenses committeed by non-

In Ortiz-Barraza v. United States, 512 F.2d 1176 (9th Cir. 1975), the court adopted an identical rule with respect to *tribal* jurisdiction over state highways located on Indian reservations. The *Ortiz-Barraza* case involved the question, *inter alia*, whether the Papago tribal police had the authority to stop a non-Indian and search him on a state highway which crossed the Papago Reservation. The court concluded as follows:

> . . . [W]e note that the fact that the events of interest here may have occurred within the right-of-way for a state highway avails the defendant nothing. *Rights of way running through a reservation remain a part of the reservation and within the territorial jurisdiction of the tribal police. See*, Gurneau v. Smith, 207 N.W. 2nd 256 (N. Dak. 1973); 18 U.S.C. §1151 (1970). [Emphasis added.]

Id. at 1180.

Indians on reservation lands. Indeed, the opposite inference can be drawn readily from provisions in the Treaty which state that the Port Madison Reservation is being established for the Tribe's exclusive use, and, moreover, that no non-Indian shall be permitted to reside upon the Tribe's lands without its permission. Treaty of January 22, 1855, 12 Stat. 927, 928. The only provision in the agreement which relates in any way to the Suquamish Indian Tribe's internal sovereignty appears in article IX, pursuant to which the Indian signatories agreed not to "...shelter or conceal offenders against the law of the United States, but to deliver them up to the authorities for trial."[10] 12 Stat. at 929.

[10] For a number of reasons, the "delivery up" provisions contained in the Treaty of Point Elliott should not be construed to divest the Suquamish Indian Tribe of criminal jurisdiction over non-Indians. The explicitly articulated policy of the federal government during the late eighteenth and early nineteenth centuries was to interject its authority as a buffer between Indian tribes and frequently hostile local non-Indian populations in tribally-controlled areas. The "delivery up" provisions such as those contained in the Treaty of Point Elliott were adopted in furtherance of the foregoing policy. *See* generally H.R. Rep. No. 474, 23rd Cong., 1st Sess. (1834). Pursuant to such provisions, the federal government undertook to prosecute and punish non-Indians for offenses committed against Indians, and, in doing so, reassured Indian tribes that non-Indian offenders were being punished – and without offending the local non-Indian community.

Against this historical background no reason exists for assuming that Indian tribes understood themselves to be permanently divested of criminal jurisdiction over non-Indians as the result of agreeing to "delivery up" provisions in treaties. To the contrary, the more reasonable conclusion is that Indian tribes merely wished to enlist the assistance of the federal sovereign to avoid antagonizing their non-Indian neighbors while still effecting the maintenance of law and order on their reservations.

Nor does the second agreement entered into in 1905 between the Suquamish Indian Tribe and the United States contain provisions limiting tribal authority over offenses committed within reservation boundaries by non-Indians. *See generally* Act of March 3, 1905, 33 Stat. 1048, 1078-79. The 1905 agreement not only failed to withdraw any powers from the Tribe, but also indicated explicitly that it did not deprive the signatories of any benefits "...not inconsistent with the provisions of this agreement." 33 Stat. at 1079. Thus, none of the treaties or agreements entered into between the Suquamish Indian Tribe and the United States contains language which expressly or impliedly limits tribal criminal jurisdiction over non-Indians.

B. The General Crimes Act did not effect a preemption of the Suquamish Indian Tribe's jurisdiction over crimes committed by non-Indians on the Port Madison Reservation.[11]

The federal statute primarily relied upon by petitioners Oliphant and Belgarde as preempting tribal jurisdiction over offenses committed by non-Indians is the General Crimes Act. See 18 U.S.C. §1152 (1970). Specifically, the Act provides the following:

[11] The General Crimes Act admittedly was construed in Ex parte Morgan, 20 Fed. 298 (W.D. Ark. 1883), and Ex parte Kenyon, 14 Fed. Cas. 353 (No. 7720) (W.D. Ark. 1878), to preempt tribal criminal jurisdiction over non-Indians. Neither of the foregoing decisions, however, offered any reasoning in support of its conclusion, and in both cases the statements were mere *dicta*. Furthermore, both opinions endorsed the view, since conceded by all legal authorities to be incorrect, that Indian tribes do not possess jurisdiction over their own members for offenses committed against non-Indians. *See* Vollman, *Criminal Jurisdiction in Indian Country*, 22 U. Kan. L. Rev. 387, 391

[footnote continued]

> Except as otherwise provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

18 U.S.C. §1152 (1970).

For a number of reasons, which are described with specificity below, the General Crimes Act should not be construed to have preempted tribal authority over crimes committed by non-Indians on reservation lands.[12] On its face the legislation plainly does not

(1974); M. West, *Manual of Indian Criminal Jurisdiction* §D-2, at 63 (1977). Finally, the precedential value of the *Morgan* case, which had denied the assertion of jurisdiction by the Cherokee Nation over even a naturalized Cherokee citizen, was further subverted by the Supreme Court in Alberty v. United States, 162 U.S. 499 (1896), and Nofire v. United States, 164 U.S. 657 (1897), which indicated that Indian tribes possess the authority to exercise jurisdiction over offenses committed by adopted tribal members. Thus, the *Morgan* and *Kenyon* decisions, at best, are of extremely questionable value as support for the conclusion that the General Crimes Act effected a preemption of tribal criminal jurisdiction over non-Indians.

[12] Two opinions rendered by the Attorney General—one of which makes reference to legislation enacted in 1834 that is codified at the present time in the General Crimes Act—do conclude that Indian tribes lack authority over crimes committed by non-Indians on reservation lands. See 7 Op. Att'y Gen. 174

[footnote continued]

preclude Indian tribes from exercising criminal jurisdiction over non-Indians. Instead, it merely provides for federal jurisdiction with respect to crimes committed in Indian country—while expressly stipulating that such authority does not extend to offenses committed by one Indian against another, to any Indian who has been punished under tribal law,[13] or to those situations where treaty provisions accord tribes exclusive powers.

(1855); 2 Op. Att'y Gen. 693 (1834). In both opinions, however, which considered the specific question whether the Choctaw Nation had criminal jurisdiction over non-Indians, the Attorney General appears to have relied upon explicit provisions contained in the Treaty of Dancing Rabbit Creek, 7 Stat. 333, that he felt had divested the Nation of such authority. The Attorney General's action, therefore, was not inconsistent with the proposition that, except as expressly limited by a federal treaty or statute, Indian tribes have criminal jurisdiction over offenses committed by non-Indians on reservation lands.

[13] The *amicus curiae* Kitsap County argues that this specific provision, which was added to the General Crimes Act by legislation enacted on March 27, 1854, 10 Stat. 269, to avoid double jeopardy problems, represents further evidence that tribal criminal jurisdiction did not extend to non-Indians. Specifically, Kitsap County's contention is that, if Indian tribes had possessed authority over offenses committed by non-Indians, Congress would not have limited its 1854 amendment of the General Crimes Act to Indians.

The legislative history of the 1854 Act provides substantial support for the proposition that the omission of any reference to non-Indians represented mere oversight and not a studied decision that no reference need be made to non-Indians because they were not subject to tribal criminal jurisdiction. First, the 1854 amendment to the General Crimes Act took place in the midst of long and heated debate on the Kansas-Nebraska bill, and, quite literally, consumed only minutes of Congress' time. Second, the sole example which was offered during floor debate to justify the amendment involved an Indian and not a non-Indian. Thus, in considering the 1854 Act, Congress really had neither the time nor the occasion to consider in a thoughtful manner whether the legislation should make reference to non-Indians as well as Indians. *See generally* 32 Cong. Globe 700-01 (1854).

Despite the fact that the affirmative grant of jurisdiction contained in the foregoing statute is nowhere stated to be exclusive, petitioners appear to assume, totally without foundation in light of established legal principles, that federal power operates to the exclusion of tribal authority. In *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 479 (1936), the Supreme Court emphasized the "general rule that the grant of jurisdiction to one court does not, of itself, imply that the grant of jurisdiction is to be exclusive."

Moreover, on its face the General Crimes Act negates the conclusion that federal jurisdiction is to be exclusive. Specifically, the statute provides that federal jurisdiction shall not extend to "any Indian committing any offense in the Indian country who has been punished by the local law of the tribe. . . ." 18 U.S.C. §1152 (1970). Thus, Congress clearly contemplated that, at least with respect to offenses committed by Indians against non-Indians, tribal and federal jurisdiction was concurrent. *See* M. WEST, MANUAL OF INDIAN CRIMINAL JURISDICTION §D-2, at 63 (1977). Nothing on the face of the statute provides support for the proposition that Congress' contemplations were different concerning crimes committed by non-Indians.

The legislative history of the General Crimes Act also argues against the alleged Congressional preemption of tribal jurisdiction over crimes committed by non-Indians on reservation lands. The Trade and Intercourse Act of 1834, which represents the primary legislative antecedent for the current provisions in section 1152, originally was introduced as one of three related Indian bills.[14] The legislative package contained bills which (1)

[14] The provisions which at the present are codified in 18 U.S.C. §1152 appeared in section 25 of the trade and intercourse bill. See H.R. 489, 23rd Cong., 1st Sess. (1834).

reorganized the Department of Indian Affairs; (2) provided for the regulation of trade and intercourse with Indian tribes; and (3) authorized the organization and establishment of a Western Territory which would be reserved exclusively to Indian tribes.[15] See H.R. 490, 23rd Cong., 1st Sess. (1934); H.R. 489, 23rd Cong., 1st Sess. (1934); H.R. 488, 23rd Cong., 1st Sess. (1834). The House Committee on Indian Affairs clearly contemplated that the three bills were interrelated and effected the establishment of a "system" of laws regulating Indian affairs:

> These relations, though subjects of different bills, are intimately connected. They are parts of a system, and of a system which is itself, also, intimately acquainted with the general legislation of the country. [The Committee members] have, therefore, deemed it proper to present, in the same report, their view on the subject embraced in the several bills.

H.R. REP. No. 474, 23rd Cong., 1st Sess. 1 (1834).

The Western Territory bill recognized that, with certain very narrow qualifications, Indian tribes possessed jurisdiction over crimes committed by non-

[15] The Western Territory bill and the trade and intercourse bill followed very closely recommendations which had been made by the Commissioners of Indian Affairs West in a report to the Secretary of War dated February 10, 1834, which suggested the following:

> . . . [T]he municipal laws of the tribes may be enforced; and, should the laws of the tribes and the laws of the United States give concurrent remedies, this would create no difficulty. It is, indeed, desirable to encourage the several tribes to adopt salutary laws, as far as possible, and render less frequent the intervention of Government. . . .

Document "T", H.R. Rep. No. 474, 23rd Cong., 1st Sess. (1834).

Indians on Indian lands.[16] Section 9 of the proposed legislation, for example, provided the following:

> . . . [I]n all cases when a person not a member of any tribe shall be convicted of an offense, the punishment whereof by the laws of the tribe shall be death, the judgment shall be forthwith reported to the Governor, who may for good reasons suspend the execution thereof until the pleasure of the President shall be known.

H.R. 490, 23rd Cong., 1st Sess. (1834). *Accord*, 10 REGISTER OF DEBATES IN CONGRESS 4767, 4771, 4775 (1834).

Furthermore, the legislative history of the Western Territory bill confirms the foregoing conclusion concerning recognition of tribal criminal jurisdiction over non-Indians. The committee report on the proposed legislation contained the following:

> The right of self-government is secured to each tribe, with jurisdiction over all persons and property within its limits, subject to certain exceptions, founded on principles somewhat analogous to the international laws among civilized nations.
>
> Officers and persons in the service of the United States, and persons required to reside in the Indian

[16] The Western Territory bill was tabled in 1834 for further consideration at the next session of Congress, and ultimately was not enacted into law. The legislative history of the proposed legislation, however, reveals that the issue of tribal jurisdiction over non-Indians played no significant role in preventing enactment. The result turned, instead, on misgivings about the form of government proposed for the territory, unabashed appeals to racism, and concerns about the amount of lands which were to be included in the territory. 10 Register of Debates in Congress 4768-72, 4775-77, 4777-79 (1834).

> country by treaty stipulations, must necessarily be placed under the protection, and subject to the laws of the United States. To persons merely traveling in the Indian country the same protection is extended. . . .
>
> As to those persons not required to reside in the Indian country, who voluntarily go there to reside, they must be considered as voluntarily submitting themselves to the laws of the tribes.

H.R. REP. NO. 474, 23rd Cong., 1st Sess. 18 (1834).

The legislative history of the Trade and Intercourse Act reveals identical Congressional assumptions concerning tribal criminal jurisdiction over non-Indians. Specifically, the committee report on the Trade and Intercourse Act contained the following:

> In consequence of the change in our Indian relations, the law relating to crimes committed in the Indian country, and to the tribunals before whom offenders are to be tried, require revision. By the Act of 3rd March, 1817, the criminal laws of the United States were extended *to all persons* in the Indian country, without exception, and by that act, as well as that of 30th March, 1802, they might be tried wherever apprehended. It will be seen that we cannot, consistently with the provisions of some of our treaties, and of the territorial act, extend our criminal laws to offenses commited by or against Indians, of which the tribes have exclusive jurisdiction; *and it is rather of courtesy than of right that we undertake to punish crimes committed in part by and against our own citizens.* [Emphasis added in part and original emphasis in part.]

H.R. REP. NO. 474, 23rd Cong., 1st Sess. 13 (1834). Thus, as in the case of the Western Territory bill,

Congress did not perceive provisions in the trade and intercourse legislation, which ultimately became the modern General Crimes Act, to be inconsistent with the continued exercise by Indian tribes of concurrent criminal jurisdiction over offenses committed by non-Indians.[17]

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[17] The *amicus curiae* Kitsap County also argues that judicial treatment of the Major Crimes Act, 18 U.S.C. §1153 (1970), which confers on federal courts jurisdiction over certain "major" offenses committed by Indians in Indian country, is consistent with the proposition that the General Crimes Act preempted tribal jurisdiction over non-Indians. Specifically, Kitsap County contends, after assuming that 18 U.S.C. §1153 prevents concurrent tribal jurisdiction over major crimes, that "[i]t is difficult to understand how Congress would preclude tribes from exercising jurisdiction over major crimes committed by Indians, but allow tribes to exercise jurisdiction over non-Indians for the same major crimes." Brief for *Amicus Curiae* Kitsap County, at 47-48.

The flaw in Kitsap County's argument is the assumption that 18 U.S.C. §1153 prohibits Indian tribes from exercising concurrent jurisdiction over major crimes. Although *dicta* does exist in a few cases which supports the foregoing conclusion, the question has never been addressed directly by the federal courts. *See generally* Felicia v. United States, 495 F.2d 353 (8th Cir. 1974); Sam v. United States, 385 F.2d 213 (10th Cir. 1967); United States v. Cardish, 145 Fed. 242 (E.D. Wis. 1906); United States v. Whaley, 37 Fed. 145 (S.D. Cal. 1888).

Moreover, the legislative history of the Major Crimes Act strongly suggests that Congress, in enacting the statute, intended to preserve concurrent tribal jurisdiction. The bill, as originally proposed, provided that Indians charged with committing the enumerated offenses "... shall be tried therefor in the same courts and in the same manner *and not otherwise*, and shall be subject to the same penalties as are all other persons charged with the commission of said crimes respectively." (Emphasis added.) 16 Cong. Rec. 934 (1885).

The bill, however, subsequently was amended on the floor of the House of Representatives based upon the following justification:

[footnote continued]

C. The Indian Civil Rights Act of 1968 and its legislative history do not provide support for the proposition that tribal criminal jurisdiction extends only to Indians.

The Indian Civil Rights Act of 1968 and its legislative history do not support the assertions of petitioners that tribal criminal jurisdiction extends only to Indians. The petitioners' specific allegation is that, at the time it enacted the aforementioned legislation, Congress believed that tribal authority with respect to crimes committed on Indian reservations extended only to Indians.

The 1968 Act and its legislative history reveal at once the extreme weakness of petitioners' position. Section 1302 of the Indian Civil Rights Act, for example, provides, in relevant part, the following:

> No Indian tribe in exercising powers of self government shall–
>
> ...
>
> (3) subject *any person* for the same offense to be twice put in jeopardy;

Mr. BUDD. I desire to suggest another modification of the amendment–to strike out the words 'and not otherwise.' The effect of this modification will be to give the courts of the United States *concurrent jurisdiction with the Indian courts in the Indian country. But if these words be not struck out, all jurisdiction of these offenses will be taken from the existing tribunals of the Indian country. I think it sufficient that the courts of the United States should have concurrent jurisdiction in these cases.* [Emphasis added.]

16 Cong. Rec. 934 (1885). If, as the foregoing legislative history indicates explicitly, the Major Crimes Act did not divest Indian tribes of concurrent jurisdiction, then Kitsap County's attempted utilization of 18 U.S.C. §1153 to prove its interpretation of the General Crimes Act is unvalid.

(4) compel *any person* in any criminal case to be a witness against himself;

. . .

(6) deny to *any person* in a criminal proceeding the right to a speedy and public trial. . . .

. . .

(8) deny to *any person* within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law. . . . [Emphasis added.]

25 U.S.C. §1302 (1970). The repeated references to the phrase "any person" belie the contention that Congress assumed only Indians were subject to the criminal jurisdiction of tribal courts.[18]

Furthermore, the legislative history of the Act, as analyzed in *Dodge v. Nakai*, 298 F. Supp. 17 (D. Ariz. 1968), provides ample support for the foregoing conclusion. In the *Dodge* case the court offered the following views on the derivation of the term "any person" in the Indian Civil Rights Act:

> Initially legislation was proposed that imposed upon Indian tribes the same limitations and restraints as those which are imposed on the federal government by the United States Constitution. Objections to this whole scale application of the Bill of Rights to Indian tribes were voiced in hearings conducted in June, 1965. The Department of the Interior offered a substitute bill that spelled

[18] The *amicus curiae* Kitsap County attempts to avoid this conclusion by arguing that the phrase "any person" was intended by Congress to apply with respect to civil rather than criminal matters. The face of the statute, which employs the term "any person" in what obviously are provisions relating to criminal proceedings, renders Kitsap County's position untenable. *See* 25 U.S.C. §§1302(3), 1302(4), 1302(6) (1970).

> out in specific terms the rights Indians would possess in their relationships with tribal governments. The substitute bill specifically referred to "American Indians" in delineating the rights to be established. *See* Hearings on the Constitutional Rights of American Indians Before the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary, 89th Cong., 1st Sess., at 5, 317-18 (1965). In May, 1966, the Department of the Interior submitted supplemental testimony and a revision of the substitute bill that was intended to establish rights for all persons who may be subject to the jurisdiction of tribal governments, whether Indians or non-Indians. *See* Summary Report on the Constitutional Rights of American Indians of the Senate Subcommittee on Constitutional Rights of the Committee of the Judiciary, 89th Cong., 2d Sess., at 9-10 (1966). At this point, along with immaterial changes, the term "any person" was substituted for the term "American Indian" throughout the bill that eventually became Title II. That language remained in the bill up to and including the time of its enactment into law.

Id. at 24.

Thus, the Indian Civil Rights Act of 1968 provides no support for the proposition that Congress believed non-Indians to be beyond the reach of tribal criminal jurisdiction. To the contrary, the materials discussed above plainly support precisely the opposite conclusion.

D. The question whether Public Law 83-280 [19] deprived the Suquamish Indian Tribe of criminal jurisdiction over non-Indians need not be considered because, contrary to petitioners' allegations, Public Law 83-280 has no application on the Port Madison Reservation, and is not, therefore, legally relevant in this case.

Finally, petitioners Oliphant and Belgarde argue that Public Law 83-280 has effected an extinguishment of the Suquamish Indian Tribe's jurisdiction over crimes committed by non-Indians on the Port Madison Reservation.[20] The foregoing contention need not be reached because, as the discussion below demonstrates, Public Law 83-280 has no application on the Port Madison Reservation.

Pursuant to section 7 of Public Law 83-280, the State of Washington adopted a statute in 1957 which authorized the State to assume jurisdiction over the Port Madison Reservation when the Governor had received evidence of tribal assent. *See* Rev. Code Wash. §§37.12020-070. The Suquamish Indian Tribe subsequently consented to the exercise of state jurisdiction, and on May 15, 1958, the Governor promulated a

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[19] Pub. L. No. 83-280, 67 Stat. 590, *as modified*, 25 U.S.C. §1321 (1970).

[20] The provisions in Public Law 280 which applied to the State of Washington were set forth in sections 6 and 7. The former gave the consent of the United States to jurisdictions such as Washington "... to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this act...." 67 Stat. at 588. Section 7 allowed states "... not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this act, to assume jurisdiction ... by affirmative legislative action...." 67 Stat. at 588.

formal proclamation declaring the effectiveness of the State of Washington's authority on the Port Madison Reservation.

In 1968, however, Congress enacted legislation which provided for the retrocession by a state of any jurisdiction it might have assumed previously under Public Law 83-280. *See* 25 U.S.C. §1323 (1970). On August 26, 1971, the Governor of the State of Washington issued a proclamation retroceding to the United States jurisdiction over the Port Madison Reservation. On April 14, 1972, the Secretary of the Interior accepted the State of Washington's retrocession of jurisdiction.[21] *See* 37 FED. REG. 7535 (1972).

The petitioners allege that the State of Washington's retrocession of jurisdiction to the United States was ineffective. Specifically, they contend that the Governor of Washington attempted to effect the return of jurisdiction to the United States in violation of state laws which required the Washington legislature to approve the retrocession.

In *United States v. Brown*, 334 F. Supp. 536 (D. Neb. 1971), the court rejected a claim which, substantively, cannot be distinguished from the argument made by petitioners in this case. The *Brown* litigation involved the question whether retrocession of state jurisdiction to the United States under 25 U.S.C. §1323 can be legally effective if done in violation of procedures established by state law. The court upheld the validity of the retrocession based upon the following analysis:

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[21] Pursuant to Executive Order No. 11435, 33 Fed. Reg. 17339, the President designated the Secretary of the Interior as his representative for purposes of exercising the authority conferred upon the United States by 25 U.S.C. §1323.

The federal government, having plenary power over the Indians, had the power to prescribe any method or event it desired to trigger its own re-assumption of control over Indian affairs within a state. In fact, the triggering event could have been devoid of any mention of state action at all.

The plenary power of the federal government over Indian affairs, the inescapable difficulty of requiring the Secretary to delve into the internal workings of the state government, and the reliance of the federal government upon what appeared to have been a valid state action, are all factors to be considered and lead the Court to the conclusion that the federal interpretation of the effectiveness of state action triggering the re-assertion of federal jurisdiction is and was controlling. "Retrocession" does not imply any particular procedure or action on the part of the states involved and the need for finality and importance of the various competing interests here dictates that the state action presented complies with the federal requirements of "retrocession."

> The federal government, having the power to preempt jurisdiction over the Omaha Reservation, had the power to so define and construe the word "retrocession" as to remove from the determination of federal assumption of jurisdiction any question of the procedural validity or invalidity of the state's act of retrocession. Considering the problems presented by any other holding, the Court holds that the term "retrocession," as determined by the Secretary of the Interior, was fulfilled by such action as the state took in Resolution 37.

Id. at 540-41. *Accord, Omaha Tribe v. Village of Walthill,* 334 F. Supp. 823 (D. Neb. 1971), *aff'd,* 460 F.2d 1327 (8th Cir. 1972), *cert. denied,* 409 U.S. 1107 (1973). For

the legal and policy reasons so clearly specified in the *Brown* case, petitioners are not now in a position to question the validity of the State of Washington's retrocession six years ago of jurisdiction over the Port Madison Reservation.

III.

AS A MATTER OF SOUND POLICY, THE JURISDICTION OF INDIAN TRIBES OVER CRIMES COMMITTED BY NON-INDIANS IS ESSENTIAL TO THE ADMINISTRATION OF CRIMINAL JUSTICE ON INDIAN RESERVATIONS.

In addition to the numerous legal grounds supporting tribal jurisdiction over offenses committed by non-Indians on reservations, such tribal authority is compelled by sound policy considerations. First, the quality of law enforcement on Indian reservations, in all probability, will decline significantly if Indian tribes are denied jurisdiction over crimes committed by non-Indians. Second, the exercise by Indian tribes of criminal jurisdiction over non-Indians comports with the dictates of modern federal Indian policy and the requirements of effective criminal justice administration on Indian reservations.

A. The quality of law enforcement on Indian reservations will be affected deleteriously if Indian tribes are prevented from exercising criminal jurisdiction over offenses committed by non-Indians on Indian reservations.

For a number of reasons, the inability of an Indian tribe to exercise criminal jurisdiction over non-Indians undoubtedly would affect adversely the administration of criminal justice on Indian reservations. First, states

historically have been unable or unwilling to commit the resources which are essential to make law enforcement effective on reservation lands. [22] According to materials developed by its own officials, the State of Washington—the protestations of *amicus curiae* Kitsap County in this case notwithstanding—has yet to administer criminal justice efficiently on Indian reservations:

> Although the State assumed jurisdiction over major crimes and juvenile delinquency on reservations, counties have not been provided with resources to effectively assume the responsibilities of patrol, apprehension and investigation of offenses committed on reservations.

"Washington Comprehensive Plan for Law Enforcement" (1972), as quoted in *Hearings on S.2010 before the Senate Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs*, 94th Cong., 1st Sess. (1975) (hereinafter cited as *"Hearings"*).

The State of Nebraska, which pursuant to 25 U.S.C. §1323, recently retroceded jurisdiction over certain Indian lands within its borders to the United States, provides a disturbingly similar example. During Congressional hearings on legislation which would have effected the retrocession of all state jurisdiction over Indian reservations and confirmed tribal jurisdiction over non-Indians, the Assistant Attorney General for

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[22] Despite the fervor with which petitioners and the *amici curiae* supporting them embrace additional jurisdiction on Indian reservations in this case, states to date have been anything but enthusiastic about extending their authority over Indian lands. Under Public Law 280, few of the nineteen "optional" states—those which had a choice about assuming jurisdiction—were able to muster the necessary support to assert complete jurisdiction over Indian reservations within their boundaries.

the State of Nebraska offered the following explanation of why criminal jurisdiction over the Omaha Indian Reservation had been retroceded:

> Well, I think that first the Indians wanted it, and secondly, Thurston County, which is located there, was having financial problems enforcing the law, and I think they felt that the Federal Government was going to take over the law enforcement functions on the Omaha Reservation and they would be able to afford it better.

Hearings, at 484.

The foregoing assessment of the State of Nebraska's difficulties in financing effective law enforcement on Indian reservations has been confirmed in materials prepared by the Nebraska legislature. Specifically, the Judiciary Committee Interim Report of 1975, which was entitled "Indian Retrocession", offered the following justification for returning criminal jurisdiction to the United States: "after several years, it became apparent that local government could not support the additional demand for law enforcement personnel and services in those areas affected as a result of the jurisdictional change." *Hearings*, at 525.

The unfortunate results of the states' historical unwillingness or inability to implement effectively their criminal jurisdiction on Indian reservations are not visited solely on Indians, but, in addition, adversely affect the lives of non-Indians as well. As the Chairwoman of the Campo Reservation in California recently explained:

> We don't get any great services . . . but neither does the White community up there. . . . We're in a very isolated corner of San Diego County and what we do get out there isn't the cream of the

> crop, as far as the Sheriff's Department goes. That goes for the White community as well as the Indian reservation out there.

Am. Indian Policy Review Comm, *Task Force Four: Federal, State, and Tribal Jurisdiction, Final Report* 16 (1976) (hereinafter cited as "Task Force Report").

The District Attorney for Umatilla County, Oregon, in Congressional testimony affirming the need for tribal criminal jurisdiction over non-Indians, offered telling support for the proposition that states are incapable of maintaining law and order adequately on Indian reservations:

> Our county consists of over 3200 square miles and our reservation is some 286,000 acres. With these vast acres, State and county law enforcement simply cannot provide the protection it ought to be providing. This applies both to the Indian and to the non-Indian living on or passing through the reservation. . . . It would be naive to suppose that there will be no problems. The present situation is one of these; and that is the virtual no-man's land of confusing jurisdiction found on many reservations.

Hearings, at 563. In light of the foregoing, Indian tribes are understandably and quite justifiably reluctant to assume that, in marked contrast to contrast to their past performance,[23] states will commit adequate law enforcement

[23] As the Supreme Court itself has emphasized, racial discrimination in state law enforcement activities on Indian reservations historically has plagued relations between Indians and non-Indians. *See* United States v. Kagama, 118 U.S. 375 (1886). The following example clearly demonstrates, unfortunately, that the foregoing issue has not been relegated to history:

> The Soboba Band of Mission Indians in California complained of police harassment along with their allegations of inadequate service. The situation was so bad—failure of the local police to protect reservation lands from non-Indian trespassers and subsequent loss of cattle—that the Indians took to providing armed guards to protect their lands. . . . It is a persistent complaint that even where law enforcement services are provided on the reservation, the police are less than willing to enforce the law against non-Indians.

Am. Indian Policy Review Comm'n, *Task Force Four: Federal, State, and Tribal Jurisdiction, Final Report 18* (1976).

[footnote continued]

resources to reservation areas if Indian tribes are denied the right to exercise criminal jurisdiction over non-Indian offenders.[24]

Even assuming, however, that states do commit the resources necessary to ensure effective law enforcement on Indian reservations, a second reason exists for concluding that the quality of law and order on Indian lands will deteriorate. Specifically, as the following hypothetical so aptly illustrates, denying to Indian tribes the authority to exercise criminal jurisdiction over non-Indians makes the rational administration of a criminal justice system on Indian reservations impossible:

[24] The denial of tribal authority over crimes committed by non-Indians causes especially intractable law enforcement problems where matters uniquely "Indian" are involved. Non-Indian police officers, for example, frequently have shown gross insensitivity to tribal requests that certain reservation sites of historic or ceremonial importance be protected from non-Indian intruders:

> '. . . [T]he question frequently arises as to whether our tribal police can arrest non-Indians who commit offenses on the reservation which would be punishable under tribal law if committed by tribal members. This question arises with reference to . . . [d]esecrating or interfering with tribal graveyards, both historic and prehistoric in the non-Indian sense, and the desecration or interference with areas of the reservation having substantial religious significance to the tribe.'

Task Force Report, at 99.

> If a burglary of a non-Indian owned residence or business occurs and the perpetrator of the crime is unknown, who is obligated to investigate the crime? Obviously, if the perpetrator of the crime was known to be an Indian, then the tribal or federal government would have jurisdiction. If the perpetrator is unknown, the question of jurisdiction is uncertain. If the Sheriff or state officer attempts to investigate the crime, at what point must he cease his investigation? If he has reason to believe that the perpetrator is an Indian? Can or should he drop his investigation on the basis of hearsay? Or must he continue to a point somewhere short of filing criminal charges? Of course, the converse is also true where the Indian tribal police or federal officers investigate and where there is reason to believe that the perpetrator is a non-Indian.

Hearings, at 501.

B. The exercise by Indian tribes of criminal jurisdiction over non-Indians comports with the dictates of modern federal Indian policy and the requirements of effective criminal justice administration on Indian reservations.

An affirmation of tribal criminal jurisdiction over non-Indians not only would avoid the unfortunate events described in detail above, but it also would be completely consistent with modern federal Indian policy and the requirements of effective criminal justice administration on Indian reservations. A succinct and accurate summary of the fundamental tenets of current federal Indian policy appears in the preamble of the Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C.A. §§450 *et seq.* (1977 Supp.).

> . . . Indian people will never surrender their desire to control their relationships both among themselves and with non-Indian governments, organizations and persons.
>
> * * * * *
>
> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy. . . .

25 U.S.C.A. §§450, 450 a (1977 Supp.).

Consistent with the foregoing policy declaration, the Bureau of Indian Affairs of the Department of the Interior recently has taken a number of steps, including additional funding, to upgrade tribal judiciaries and law enforcement systems. *See generally* INDIAN SELF-DETERMINATION AND THE ROLE OF TRIBAL COURTS (American Indian Lawyer Training Program, Inc., 1977).

Furthermore, the tribal courts which have exercised jurisdiction over non-Indians have done so successfully and, in virtually all instances, without complaint from non-Indian defendants. The Gila River Indian Community Court near Phoenix, Arizona, for example, has asserted certain types of criminal jurisdiction over non-Indians since 1972, and to date its authority has never been challenged. Task Force Report, at 2.

Significantly, in the State of Washington, additional evidence of non-Indian satisfaction with tribal law enforcement capabilities exists. As a Councilwoman of the Makah Tribe recently testified before Congress:

> With respect to law and order . . . [t]he Tribe has in fact taken over this function with the silent acquiescence of county officials. Our tribal police are in fact managing all traffic enforcement on the Reservation, even though this was one of the areas expressly claimed by the State of Washington under its Act taking jurisdiction under Public Law 83-280.

Hearings, at 348. Furthermore, on the Colville Reservation in Washington, tribal law enforcement has proved so effective that the city of Nespelem, which is overwhelmingly non-Indian, contracts for police services with the Confederated Colville Tribes.

In light of the foregoing discussion, a number of important conclusions can be drawn. First, law enforcement for both Indians and non-Indians on reservations will be affected deleteriously if Indian tribes are denied criminal jurisdiction over non-Indians. Second, the exercise of such jurisdiction by Indian tribes is consistent with modern federal Indian policy, which has encouraged tribes to strengthen their institutions of government, including tribal courts, to make Indian self-determination a reality. Finally, the performance of tribal courts to date in exercising criminal jurisdiction over non-Indians hardly justifies the parade of horribles which appears in the briefs of petitioners and the *amici curiae* supporting them. See Brief for Petitioners, at 72-80, Brief for Attorney General, State of Washington, at 28, 31; Brief for State of South Dakota, at 3, 4; Brief for Kitsap County, at 17-20.

CONCLUSION

Except as expressly limited by a federal treaty or statute, an Indian tribe possesses jurisdiction over all crimes committed within the boundaries of its reservation. No federal treaty or statute has limited the authority of the Suquamish Indian Tribe over offenses committed by non-Indians on the Port Madison Reservation, and the Tribe, therefore, has the power to exercise jurisdiction with respect to crimes committed by non-Indians within its reservation boundaries. As a matter of sound policy, the jurisdiction of Indian tribes over crimes committed by non-Indians is essential to the administration of criminal justice on Indian reservations.

For the foregoing reasons, *amici curiae* respectfully urge that the decision below be affirmed.

Respectfully submitted,

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